

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WALTER C. HENRIQUEZ and DEPARTMENT OF VETERANS AFFAIRS,  
MEDICAL CENTER WEST, Los Angeles, CA

*Docket No. 97-2540; Submitted on the Record;  
Issued August 10, 2000*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found appellant at fault in the creation of an overpayment of compensation benefits in the amount of \$6,035.70 so that the overpayment was not subject to waiver; and (2) whether the Office properly directed repayment of the overpayment by withholding \$100.00 per month from appellant's continuing monthly compensation benefits.

Appellant, a nurses aide, filed a claim alleging that on May 6, 1981 he sustained a back injury in the performance of duty. The Office accepted his claim for exacerbation of lumbosacral disc syndrome. Appellant began receiving compensation on the periodic rolls as of July 31, 1981, with compensation based on the augmented rate of 75 percent. By letter dated December 6, 1995, the Office advised appellant that a preliminary determination had been made that an overpayment of compensation of \$6,378.36 occurred for the period October 11, 1991 through September 16, 1995 as he received compensation at the augmented rate without a dependent. Appellant requested an oral hearing and by decision dated June 26, 1996 and finalized June 27, 1996, the hearing representative set aside the Office's determination and remanded the case for additional development of the factual evidence regarding when appellant's youngest child, Tanya, was enrolled in college as a full-time student.

By letter dated August 21, 1996, the Office advised appellant that a preliminary determination had been made that an overpayment of compensation in the amount of \$6,035.70 occurred during the period January 1, 1992 through September 16, 1995 as appellant had received compensation at the augmented rate when only entitled to the basic statutory rate of compensation. Appellant requested an oral hearing and by decision dated June 19, 1997 and finalized June 20, 1997, the hearing representative found that appellant had received an overpayment of compensation in the amount of \$6,035.70 as his daughter turned 18 on October 10, 1991 and was only a full-time student until December 19, 1991. The hearing representative found that appellant was at fault in the creation of the overpayment of

compensation and that the overpayment should be recovered by deducting \$100.00 per month from appellant's continuing compensation benefits.

The Board finds that appellant was at fault in the creation of the overpayment of compensation in the amount of \$6,035.70 and that, therefore, the overpayment was not subject to waiver.

Section 8129(a) of the Federal Employees' Compensation Act<sup>1</sup> provides that, where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."<sup>2</sup> Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations<sup>3</sup> provides in relevant part:

"An individual is with fault in the creation of an overpayment who--

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."

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<sup>1</sup> 5 U.S.C. §§ 8101-8193, 8129(a).

<sup>2</sup> 5 U.S.C. § 8129(b).

<sup>3</sup> 20 C.F.R. § 10.320(b).

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation payments in question, he knew or should have known that the payments were incorrect.<sup>4</sup> With respect to whether an individual is without fault, section 10.320(c) of the Office's regulations provides in relevant part:

“Whether an individual is ‘without fault’ depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual's understanding of any reporting requirements, the agreement to report events that should have been reported, efforts to comply with reporting requirements, opportunities to comply with reporting requirements, understanding of the obligation to return payments which were not due and ability to comply with any reporting requirements (*e.g.*, age, comprehension, memory, physical and mental condition).”<sup>5</sup>

In support of the finding of fault, the Office noted that appellant had received a form on November 30, 1981 which stated that he must inform the Office immediately of any change in the status of his dependents.

Appellant completed an Office reporting Form 1032 on January 21, 1990 and claimed his daughter Tanya born October 10, 1973 as an dependent. On November 20, 1991 appellant completed a Form 1032 claiming Tanya as a dependent and noting that she was a full-time student. In a letter to the Office, on August 20, 1992, appellant stated that Tanya planned to register at Pasadena City College beginning September 16, 1992. He stated that she was still financially dependent on him as she had no income. Appellant completed a Form 1032 on September 15, 1992 and stated that he was no longer claiming Tanya as a dependent. Appellant responded to the question of when the dependency ceased by stating “I do n[o]t know. My daughter does not live with me, but I help her as much as I can because she is going to college and does n[o]t have a job.” In response to an inquiry by the Office, appellant completed a letter on November 18, 1992 and stated that Tanya was a full-time student until May 1992. He stated that Tanya planned to reenroll in Pasadena City College for the spring semester and that he continued to support her.

The evidence of record establishes that appellant was aware that he was not entitled to claim his daughter as a dependent after she turned 18 unless she was a full-time student. He properly informed the Office that she was enrolled in college in the fall of 1991 and did not attempt to claim her as a dependent in the form completed in September 1992. Appellant informed the Office of Tanya's intention to reenroll in college further indicating that he was aware that her status as a student had bearing on his ability to claim her as a dependent. Therefore, appellant knew or should have known that he was not entitled to checks including

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<sup>4</sup> *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

<sup>5</sup> 20 C.F.R. § 10.320(c).

compensation at the augmented rate during the period after October 10, 1991 when his daughter was not a full-time student.

The Board further finds that the Office properly determined the amount of the overpayment.

Following the June 27, 1996 hearing representative's decision, the Office requested Tanya's school transcripts. California State University, Northridge, indicated that Tanya was a full-time student in the fall semester of 1991 and that she did not complete any units in the spring semester of 1992. Pasadena City College submitted Tanya's transcript indicating that she enrolled in two classes in the fall of 1992 and completed one for a total of three credit hours. In the spring of 1993, she completed six credit hours and in the fall of 1993 she failed to complete any credit hours. These documents establish that Tanya was not a full-time student for any period after December 1991. Therefore, the Office properly calculated the amount of the overpayment by determining the difference between the compensation payments received by appellant from January 1992 through September 6, 1995 calculated at the augmented rate, \$54,209.63 and the amount that he was entitled to received at the statutory rate, \$48,173.93. Appellant received an overpayment of compensation in the amount of \$6,035.70.

The Board further finds that the Office properly directed repayment of the overpayment by withholding \$100.00 per month from appellant's continuing monthly compensation benefits.

Section 10.321(a) of the regulations<sup>6</sup> provides:

"Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any resulting hardship upon such individual."

In the present case, the Office, in determining the rate of repayment by deduction from appellant's continuing compensation payments, considered the factors set forth by this section. The Office hearing representative reviewed appellant's financial obligations at the oral hearing on May 29, 1997. Appellant stated that he spent \$240.00 a month on food, \$30.00 per month on clothing, \$300.00 in rent, \$60.00 in utilities, \$70.00 in car insurance, \$60.00 in gas and oil for his vehicle, \$137.00 in medical insurance, \$45.00 in burial insurance, \$85.00 on medicines and \$40.00 on doctor's appointments. The hearing representative determined that appellant received \$1,196.00 in compensation benefits per month<sup>7</sup> and that he had expenses of \$1,062.00.<sup>8</sup> He concluded that appellant had a surplus of approximately \$30.00 and that, although a withholding

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<sup>6</sup> 20 C.F.R. § 10.321(a).

<sup>7</sup> Appellant testified that he received \$1,104.00 in compensation benefits every 28 days.

<sup>8</sup> The Board notes that appellant's expenses as listed at the oral hearing total \$1,067.00.

of \$100.00 per month of his compensation benefits would result in some hardship for appellant, it would result in a prompt repayment of the overpayment.

The June 20, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.  
August 10, 2000

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member